IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, members of the Tax Commission of the State of Washington,
Appellants,

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON-KIER COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF AND ADDITIONAL AUTHORITIES

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ADDITIONAL AUTHORITIES

In support of their position that the compensating tax, viewed as an excise, is not violative of the commerce clause (App. Brf., p. 16), appellants add the following:

Sheppard v. Musser, — Tex. —, 92 S. W. (2d) 219, upholding a state tax upon the use of cigarettes of ultra-state origin, after coming to rest within the state, as not an unlawful interference with interstate commerce.

Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326, holding a state statute imposing a tax for the privilege of using motor vehicles within the state not to violate the commerce clause as applied to automobiles purchased outside the state and then brought into the state.

The following is quoted from the case last cited in response to what was said in the majority opinion below as to the off-setting of taxes paid in other states resulting in discrimination between states (see App. Brf., p. 30):

"When the substance of subsection 13 of section 404, chapter 371, Public Laws 1935, is regarded rather than its form, and its operation tested by its practical application, it is manifest that there is no discrimination in favor of the North Carolina bought automobile over the Virginia bought automobile by the remission of the privilege or excise tax to the owners of the former, since the result is, as stated in the act itself, 'to avoid in effect double taxation' on automobiles bought from North Carolina dealers and to make the tax on all new bought automobiles equal. There can be no discrimination where there is equality." (186 S. E. 329.)

REPLY BRIEF

Appellees' contention that compensating tax designed to obstruct interstate commerce.

Because the sales and compensating tax measures do not actually place a bounty on interstate commerce by exempting articles of ultrastate origin, counsel pretends to discover a legislative purpose actually to obstruct commerce between the states.

This, of course, is not true. Interstate commerce cannot be burdened simply by failure to subsidize. The tax being precisely the same wherever an article be purchased, interstate commerce flows as freely as though neither sales nor "use" tax were exacted.

It is urged that the compensating tax is not a true revenue measure. Can such claim be seriously considered, when in this very suit plaintiffs seek the nullification of over $18,000 in taxes covering only a two-months period? (R. 11.) Can it be said that an exaction of 2% of the annual purchases made by the people of a state the size and population of Washington is not a true revenue measure?

That the tax commission was without authority to declare the purpose of the compensating tax has been heretofore shown. (App. Brf., p. 27.)

But, in any event, the court will not inquire into the legislative purpose of a revenue measure.

In *Magnano Co. v. Hamilton*, 292 U. S. 40, 44, Your Honors said, in sustaining a tax of 15 cents per pound on butter substitutes sold within the state, a tax claimed to be prohibitive:

"Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry."

Were the rule otherwise, it would, we submit, most certainly have been applied in those cases holding that a tax levied in respect of goods of a particular kind is not discriminatory as against interstate commerce merely because goods of that kind are not produced locally but are all imported from other states. See *Texas Co. v. Brown*, 258 U. S. 466, 476; *Askren v. Continental Oil Co.*, 252 U. S. 444; *Magnano v. Hamilton*, 292 U. S. 40.

May we also point out that the legislature itself thus expressly declared its purpose in the exaction of the various taxes imposed by the 1935 Revenue Act, including, of course, the sales and compensating taxes:

"The limitations on the taxing power of the various municipalities of the state make it imperative that the state assume a larger part of the expense necessary to provide reasonable support for public education and for the care of indigent persons and the unemployed. To meet the obligations so imposed, and better to distribute the burden of taxation, the State of Washington hereby declares its purpose to levy a tax on persons engaged in business activities and upon commodities, estates and gifts as enumerated in this act and in the manner hereinafter in this act set forth." Sec 2, Chap. 180, Laws of Wash. 1935.

Appellees' contention that compensating tax is in effect sales tax because exacted only on use of goods purchased.

The tax is exacted, not on the sale or the privilege of making a sale, but upon the privilege of use within the state. True, the tax is imposed only as to property purchased at retail, but this limitation is for the obvious purpose of avoiding discrimination in its application as

the complement of the retail sales tax imposed only with respect to articles purchased at retail. One acquiring tangible personal property other than by purchase at retail is exempted from the operation of both the sales and compensating taxes. But he is subject to both with respect to articles purchased at retail for the purpose of transformation into some other article, as, for instance, steel and wood for the construction of a machine.

Appellees' contention that merchants of states imposing no sales tax may be burdened with the equivalent in other taxes.

It is urged that the Oregon merchant, for instance, because relieved of a sales tax, may be subject to a correspondingly increased property or income tax.

The short answer is, of course, that the sales and "use" taxes are imposed by Washington on its own citizens to raise revenue required for its own purposes. The constitutional provisions as to freedom of interstate commerce, most certainly cannot demand that each state's taxation policy be circumscribed by the taxation methods of sister states.

The tax is imposed, not on the Oregon merchant, but upon the use of property in Washington. If Washington has avoided discrimination so far as its own tax laws are concerned, the constitutional requirements should, we submit, be satisfied.

Appellees' contention that compensating tax designed to attach before interstate commerce ceases.

Of course there is nothing in the act remotely indicating any such legislative purpose. No such construction was given to the act by the state supreme court in

sustaining the tax. See *Vancouver Oil Co. v. Henneford*, 183 Wash. 317.

That no attempt is made to collect the tax with respect to articles while still subjects of interstate commerce, is sufficiently evidenced by the following statement in the tax commission's letter to plaintiff (R. 34):

"You are advised that tax liability • • • arises at the time tangible personal property is put to use within the state of Washington. Such property is put to use by the first act *after delivery is completed within the state* by which the article purchased is actually used or made available for use with intent actually to use the same within the state." (Emphasis supplied.)

No injunction should issue unless the administrative officers in collecting the tax, are actually invading plaintiffs constitutional rights. *Edelman v. Boeing Air Transport*, 289 U. S. 249.

It is well settled, of course, that where to construe a state statute as applicable to interstate commerce would make it unconstitutional as a regulation of such commerce, it will be held, if possible, to apply only to commerce wholly within the state. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; Vol. 7, Encyc. U. S. Sup. Crt. Rep., p. 356, note 75.

Moreover, even could the act be construed as imposing the tax liability before the property's interstate journey has finally ended, it is apparent that the offending provisions could and should be eliminated without affecting the unobjectionable features.

"A statute which affects and regulates both interstate and intrastate commerce is not necessarily wholly invalid. It will be sustained and enforced so far as it affects commerce wholly within the state, provided the

allowed and prohibited parts are severable." Vol. 7, Encyc., U. S. Sup. Crt. Rep., p. 356.

Moreover, plaintiffs are in no position to claim exemption from the tax on the ground urged, since they expressly allege that the articles for the use of which the tax is here sought to be imposed were "used in and about and for the purposes of the construction of the Grand Coulee Dam." (R. 11.)

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it; that is, a legal interest in defeating it. The objection to the constitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." Vol. 4, Encyc. U. S. Sup. Crt. Rep., p. 74, and Supplement.

For the reasons urged in this and our opening brief, we respectfully submit that the order granting the interlocutory injunction should be reversed.

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